IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 584.

In the Matter

of

The Petition of NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73", for Exoneration from or Limitation of Liability.

COMMERCIAL MOLASSES CORPORATION,
Petitioner,
(Claimant below),

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner of the Tank Barge "T. N. No. 73",
Respondent,
(Petitioner below).

REPLY BRIEF FOR PETITIONER.

T. CATESBY JONES,
LEONARD J. MATTESON,
Proctors for Petitioner.

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REPLY BRIEF FOR PETITIONER.

The respondent, New York Tank Barge Corporation (petitioner below), has filed a brief in opposition to the petition of Commercial Molasses Corporation for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in which by many references to testimony and some references to the Findings of Fact, an effort is made to have it appear that only a question of fact has been presented to this Court by your petitioner.

At page 3 of respondent's brief, it is said:

> "* * * before receiving any molasses she was inspected not only by respondent's assistant superintendent, but also by a representative of cargo interests, and was found to be clean, fit, and tight, with no leaks, cargo's representative admitting that the tanks 'were dry and clean' (Fdgs. 10, 26; R. 308, 314; R. 37, 39, 65, 71, 174-176, 192, 197, 198, 228)."

The findings Nos. 10 and 26 do not support this statement. Finding 10, R. 208, is as follows:

> "10. The barge was used for the carriage of molasses and vegetable oils in and about New York Harbor. Petitioner, on numerous occasions, had thus carried molasses for the claimant."

The relevant portion of Finding 26 is as follows:

> "26. * * * Before the loading commenced an examination was made by a representative of the cargo interests and he pronounced her clean and fit for loading."

There is no finding that the boat was "tight and with no leaks".

On the contrary the court found as a fact on the state of the record that the loss resulted from unseaworthiness:

> "* * * I find that this loss resulted from unseaworthiness" (Con. 1, R. 324).

At page 7, the following statement appears:

> "After careful consideration of the record, the trial judge found that 'the best that can be said

> of the state of the record is that the cause of the accident has been left in doubt' (R. 295; Con. 2, R. 324)."

On the contrary, the District Judge found that the presumption or inference of unseaworthiness had not been rebutted and that therefore the factual inference from the evidence was that the loss resulted from unseaworthiness:

> "1. When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, *I find that this loss resulted from unseaworthiness. The Emergency*, 9 F. Supp. 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 51 F. (2d) 494" (R. 324; Con. 1, R. 324). (Italics ours.)

The quotation in respondent's brief is from Conclusion 2 where the Court, in commenting upon respondent's argument, said:

> "2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner of the right to limit liability to the value of the barge and her freight then pending" (Con. 2, R. 324).

Obviously this is not a finding.

Nor is there a finding that "cargo's representative" admitted "that the 'tanks were dry and clean' " as is stated in respondent's brief. The person referred to by the respondent was not a representative of Commercial Molasses Corporation, your petitioner, but

was the representative of United Molasses Company, vendors from whom your petitioner purchased the cargo (R. 192). His inspection was only of the tanks for cleanliness (R. 197).

At page 4 of respondent's brief, reference is made to Finding 33 of the trial Judge and the calculations based on expert testimony introduced by the respondent. The weight accorded these figures by the District Judge is set forth in Finding 35 (R. 318):

> "35. Petitioner produced, at the trial, certain experts who endeavored to figure the disposition of the load as between the forward and after tanks, at the time the barge sank. After an examination of their computations I was of the opinion that their estimates and conclusions were not well founded and could not form a satisfactory basis for determining whether at the time of the accident the after tanks had been overloaded, through the negligence of the mate of the barge."

Again on page 4, the statement is made:

> "The diver who subsequently took part in the raising of the barge found no evidence of leakage when he examined the barge (Fdgs. 21, R. 312, 313)."

In finding 21, it appears that the diver testified:

> "that he found the barge lying about two-thirds submerged in the mud and canted over on one side at an angle of about 45 degrees" (Fdg. 21, R. 312, 313).

In addition to being submerged in the mud, the barge was totally submerged in water of the slip when the

examination was made (R. 246, 247). Consequently the leakage could not possibly have been determined if it had existed.

At page 6 of respondent's brief, a statement is made with respect to the requirements of proof of lack of privity or knowledge by the respondent (Petitioner in the Court below). The lack of privity or knowledge of the respondent as a petitioner for limitation of liability is not an issue in this case for the respondent's contract with your petitioner was a personal contract making respondent liable for breach of warranty of seaworthiness without benefit of limitation of liability, irrespective of proof of lack of privity or knowledge.

> *Pendleton v. Benner Lines*, 246 U. S. 353;
> *Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82.

At page 9 of respondent's brief, it is stated that:

> "The basic question is whether your petitioner can escape its admitted and unexplained breach of its contractual agreement to procure insurance for the account of your respondent and to release your respondent in the event of such a breach."

The Circuit Court of Appeals did not base its decision on this issue and did not even consider the argument with respect to it (R. 345). That Court said:

> "Since therefore we think that the claimant did not prove its case, even if the clause in the charter regarding insurance did not cancel the warranty of seaworthiness, it is not necessary to pass on that question" (R. 345).

The decision of the Circuit Court of Appeals was based entirely on the question of the burden of proof of seaworthiness or unseaworthiness as stated in the petition and brief in support thereof. On that question, we submit the decision of the Circuit Court of Appeals was in conflict with the decision of this court in *The Edwin I. Morrison*, 153 U. S. 199, and also in conflict with the decisions in the other circuits, *S. C. Loveland Co.* v. *Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655, and cases cited in the brief in support of the petition, pages 18-24.

The basic question stated by the respondent was not decided by the Circuit Court of Appeals. The decision of the District Court on that point was clearly wrong (Brief in Support of Petition, pp. 26-29).

Sanbern v. *Wright & Cobb Lighterage Co.*, 171 Fed. 449, 454.

We would not have burdened this Court with a further brief in this case, but for respondent's disregard of the findings below. On the findings below, the importance of the questions presented is manifest.

Respectfully submitted.

T. CATESBY JONES,
LEONARD J. MATTESON,
Proctors for Petitioner.